In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1297

DONALD E. JOHNSON, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL., APPELLANTS

v.

WILLIAM ROBERT ROBISON, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

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William Robert Robison on behalf of himself and all others similarly situated, moves that the final judgment of the district court be affirmed pursuant to Rule 16 of this Court on the ground that no substantial question exists as to the correctness of the decision rendered by the court below.

REASONS FOR GRANTING THE MOTION

We recognize immediately that the constitutionality of denying veterans' educational benefits to conscientious objectors who perform alternate service is an issue which this Court has not specifically decided. But, it is respectfully submitted that the ruling below reflects so faithful and accurate an application of this Court's rulings as to warrant summary affirmance.

Appellants challenge the decision below on two grounds. First, on the merits, appellants assert that the district court erroneously assessed the purposes Congress sought to achieve by providing educational benefits to veterans. Second, appellants take the position that even if the statutory denial of educational benefits to conscientious objectors violates the Due Process Clause of the Fifth Amendment, the federal courts, including this Court, have no power to redress that constitutional violation. Both contentions are wholly without merit.

1. Appellants concede, as the legislative history makes clear they must, that the "primary motivation" behind veterans' educational benefits (J.S. 6)[1], is, as the court below found, "to eliminate the educational gaps between persons who served their country and those who did not." (19a)[2] The court below also found that as a result of the two years of alternate service conscientious objectors perform they suffer a disruption of their educational opportunities and goals to an extent equalling if not exceeding that experienced by service personnel. (20a-21a) Appellants do not contest this finding on the present appeal. And, it appears, appellants would concede that it is wholly arbitrary to deny benefits to conscientious objectors if readjustment to civilian life were the only purpose Congress intended to achieve by the Act.

Appellants claim, however, that there could be two additional purposes: "encouraging enlistments and rewarding service to one's country which involves the physical hazards inherent in active military service." (J.S. 6) No legislative history is cited to show that Congress actually sought to achieve either of these purposes, and appellants' pointed reliance on a phrase in *Flemming v. Nestor*, 363 U.S. 603 (J.S. 6), strongly suggests that they are urging this Court to make up purposes to justify the Act's discrimination against con-

[1] "J.S." refers to the Jurisdictional Statement. Unless otherwise stated, references to the "Act" relate to the Veterans Readjustment Benefits Act of 1966, 38 U.S.C. §§1651-1687.

[2] Reference is to the district court opinion reprinted in Appendix A to the Jurisdictional Statement.

scientious objectors.

In fact, appellants' intimation that rewarding hazardous service might have been a purpose, is not merely pure hypothesization, but is, in light of the explicit legislative history on this point, plainly fictitious. Congress has expressly stated the purposes of providing educational benefits in the Act itself, see 38 U.S.C. §1651, thus eliminating all room for hypothesis. Section 1651 enumerates four purposes, none even remotely supporting appellants' position.[3] Moreover, Congress considered and specifically rejected appellants' position. The report supporting the Senate bill, which was ultimately enacted without substantial change, noted that there was opposition to the bill because it provided benefits without regard to the naure of the recipient's service.[4] But, there was no compromise on this point, because, as the Senate Report states, "the philosophy and purpose of the G.I. bills is and has been to give readjustment assistance to the veteran returning to civilian life after substantial military service and not to reward him for the risk that he might have been exposed to."[5]

The strength of Congress' resolution on this point is measured in a practical sense by the nature of the opposition, the President, the Veterans' Administration and the Department of Defense, all of whom urged limitation of benefits to wartime service, or at least to those who served in areas of hostility.[6] Not only did Congress refuse to enact such limitations, it decided to grant benefits retroactively to all veterans

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[3] Section 1651 provides as follows:

"The Congress of the United States hereby declares that the education program created by this chapter is for the purpose of (1) enhancing and making more attractive service in the Armed Forces of the United States, (2) extending the benefits of a higher education to qualified and deserving young persons who might not otherwise be able to afford such an education, (3) providing vocational readjustment and restoring lost educational opportunities to those service men and women whose careers have been interrupted or impeded by reason of active duty after January 31, 1955, and (4) aiding such persons in attaining the vocational and educational status which they might normally have aspired to and obtained had they not served their country."

[4] Senate Report No. 269, 89 Cong., 1st Sess., p. 17, (June 1, 1965).

[5] *Ibid.*

[6] It should be noted that the alternate service regulations in effect during Robison's service specifically authorized "assignment and abrupt reassignment in any part of the United States, or overseas, including war zones." 32 C.F.R. §1660.31(b). See also (4a).

who served at least 180 days during the 10 years of peacetime between 1955 and 1965.

In view of this dispositive legislative history, the court below was unquestionably correct in refusing to supply "an imaginary basis or purpose for the statutory scheme." Cf. *McGinnis v. Royster*, —— U.S. ——, ——, 93 S.Ct. 1055, 1063.[7]

The existence of appellants' second purpose, stimulating enlistments, is more plausible, but does not justify the challenged classification that denies educational benefits to conscientious objectors. Although three of the four purposes stated in §1651 are "variations on a single theme" of restoring lost educational opportunities (17a), a fourth purpose does refer to "enhancing and making more attractive service in the Armed Forces." We are mindful, as was the court below, that a minor and subordinate legislative purpose cannot be ignored. Cf. *McGinnis v. Royster, supra.* But, this Court has repeatedly held that the Equal Protection guarantee is not satisfied unless two requirements are met: first, the statutory purpose is "legitimate and non-illusory",[8] and second, the challenged classification "rationally furthers"[9] such a purpose. Appellants plainly do not and make no attempt to meet either of these requirements.

First, there is very substantial doubt that Congress established educational benefits as a bonus for any serviceman's enlistment. No such purpose is mentioned in the legislative history.[10] But far more important is the point that educational

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[7] Appellants' reliance on *Flemming v. Nestor, supra* is misplaced, first because *Flemming* involved a claim of substantive due process rather than equal protection, and second, unlike here, the purposes underlying the legislation involved in *Flemming* were not apparent from the legislative history, let alone expressly stated as in 38 U.S.C. §1651.

[8] *McGinnis v. Royster, supra* at 1063; *Baird v. Eisenstadt*, 405 U.S. 438.

[9] See *San Antonio Independent School District v. Rodriguez*, —— U.S. ——, ——, 41 U.S.L.W. 4407, 4424; *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 169, 173.

[10] There is little reality to the concept of educational benefits as encouraging enlistments. For the facts are, as the Department of Defense emphasized in its comments on the various proposals pending before Congress in 1965 and 1966, a benefits program is counterproductive because it actually discourages re-enlistments and career enlistments. See (17a). Moreover, since educational benefits are granted on an equal basis to volunteers and draftees alike, it can hardly be argued that these benefits play any significant part in stimulating enlistments.

benefits do not and could not have been intended to serve this purpose with respect to millions of servicemen, the vast majority, who volunteered between 1955 and the effective date of the Act when no benefits were offered, or who, at any time, were drafted. This class of servicemen and the class represented by Robison are indistinguishable in terms of the purposes for which educational benefits are provided; exclusion of the latter from benefits is therefore unjustifiable discrimination.

Second, it is inconceivable that the exclusion of conscientious objectors from educational benefits "rationally furthers" any Congressional purpose, including stimulating enlistments. After thorough review, see (15a-17a), the court below concluded, "the challenged exclusion is arbitrary and without any relevance to either the enhancement of service goal or the compensation goal." (20a)

2. The second question raised by appellants would be substantial if it were actually presented by this case. But, it is not; for as the court below correctly ruled, 38 U.S.C. §211(a) was not designed to preclude review of constitutional attacks on the Act itself.

This Court has firmly refused to restrict access to judicial review without "a showing of 'clear and convincing evidence' of a contrary legislative intent." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141; *Barlow v. Collins*, 397 U.S. 159, 165-167; *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410. Strict adherence to this principle of statutory interpretation is absolutely necessary if the courts are to avoid a premature or unnecessary clash with Congress on an issue that goes to the very heart of our constitutional system. For if appellants' reading of §211(a) is correct, and the Act is immune from constitutional attack in the federal courts, Congress will have taken a step which by itself and as future precedent threatens destruction of the federal system of checks and balances and of the political liberties dependent on that

system. See *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 163, 178.

But the language and history of §211(a) plainly do not support appellants' interpretation. Rather, it is clear that Congress did not intend to preclude a constitutional challenge to the Act, such as the one raised in this case.

The preclusive scope of §211(a), as the express language of the provision makes clear, is limited solely to "the decision of the Administrator on any question of law or fact under any law administered by the Veterans' Administration. . . ." This case does not involve a question of law or fact "under any law administered" by appellants; no challenge is raised to appellants' procedures or rules, to their interpretation of governing statutes, or to the substantiality of evidence supporting a decision on a particular claim for veterans' benefits. Robison and the class he represents claim that they have been denied their First and Fifth Amendment rights by a Congressional enactment, not by the administrator's decision or his process.[11]

Finally, this case does not in any respect contest the Administrator's "decision . . . on any question of law or fact," since the constitutional questions raised here could not have

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[11] Appellants' quotations from *Lynch v. United States*, 292 U.S. 571, are misleading. The broad, preclusive language taken from *Lynch* relates to the Court's discussion of the sovereign immunity of the United States, not the power of Congress to foreclose judicial review. Of course, appellees have not sued for a money judgment against the United States, as was the case in *Lynch*.

There is a side reference in *Lynch* to a predecessor statute to §211(a). But, this dictum indicates only that Congress precluded judicial review of the Administrator's decisions on questions of statutory interpretation and sufficiency of the evidence. *Lynch* contains no indication that Congress attempted to preclude review of claims that an act of Congress was unconstitutional, or even constitutional challenges to the process or findings of the Administrator.

Except for *Hernandez v. Veterans' Administration*, 467 F.2d 479 (9th Cir. 1972), none of the other cases cited by appellants supports their position. Aside from *Hernandez*, only one involved a constitutional attack on a statute, and in that case the Court reached the merits. See *Hoffmaster v. Veterans Administration*, 444 F.2d 192 (3rd Cir. 1971). The court in *deRudulfa v. United States*, 461 F.2d 1240 (D.C. Cir. 1972) noted that *Lynch* was based on a view of veterans' benefits as gratuities that was probably inconsistent with present day rulings by this Court and indicated that if a constitutional claim had been raised the court would have decided it. Even *Hernandez* recognizes that a view of §211(a) as imposing a complete bar to review is unacceptable.

been[12] and were not decided by appellants. In fact, as the court below notes, appellants have repeatedly disavowed the power to decide the constitutional questions presented by this case. (8a)

CONCLUSION

For the reasons stated herein and by the court below, this motion should be granted.[13]

Respectfully submitted,

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[12] *McKart v. United States*, 395 U.S. 185; *California Comm'n v. United States*, 355 U.S. 534, 539.

[13] If jurisdiction is noted by the Court, appellees will seek to support the judgment on all of the grounds presented to the court below.